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RECEIVED

JUL 11 2001 July 5, 2001

FCC MAIL ROOM

ORIGINAL

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 - 12th Street, S.W.  
Room TW - 204B  
Washington, D.C. 20554

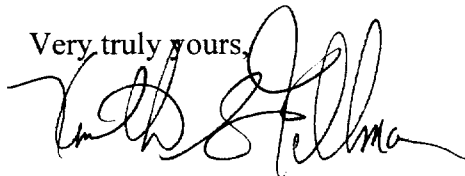
Re: *City of Greenwood Village, Colorado / Submittal of Written Ex Parte Comments  
In the Matter of Notice of Inquiry: Promotion of Competitive Networks in Local  
Telecommunications Markets / WT Docket No. 99-217*

Dear Ms. Salas:

The City of Greenwood Village, Colorado submits written Ex Parte Comments in the above referenced proceeding, together with Exhibits A and B to those comments. Pursuant to the Commission's rules, 47 C.F.R. § 1.1206(b)(1) I am enclosing two copies of these written documents to your office for inclusion in the public record.

I appreciate your assistance in this matter. If there is any further information you require of me, please let me know.

Very truly yours,



Kenneth S. Fellman

KSF/eaj

cc: Kendra L. Carberry, Esq.  
Melissa Gallegos

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JUL 11 2001

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In the Matter of

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Notice of Inquiry:

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Promotion of Competitive Networks in Local  
Telecommunications Markets

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WT Docket No. 99-217

**EX PARTE COMMENTS OF THE  
CITY OF GREENWOOD VILLAGE, COLORADO**

Kenneth S. Fellman, Esq.  
Kissinger & Fellman, P.C.  
3773 Cherry Creek N. Dr., Suite 900  
Denver, Colorado 80209

Attorneys for the City of  
Greenwood Village, Colorado

July 5, 2001

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Notice of Inquiry:	)	
	)	
Promotion of Competitive Networks in Local	)	WT Docket No. 99-217
Telecommunications Markets	)	
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**EX PARTE COMMENTS OF THE  
CITY OF GREENWOOD VILLAGE, COLORADO**

**I. INTRODUCTION**

The City of Greenwood Village, Colorado ("Greenwood Village") is located on the south side of the Denver metropolitan area. Greenwood Village is a member of the Greater Metro Telecommunications Consortium, which filed comments in this proceeding dated October 11, 1999.

Recently, Greenwood Village has learned that Qwest Communications Corporation ("Qwest") held meetings with Commission Staff during the month of March 2001, and on March 28, 2001 filed ex parte documents dated March 27, 2001 with respect to those meetings. The ex parte filings (and presumably the information shared with Commission Staff in meetings during the month of March) contains information regarding Greenwood Village, and its pending process of drafting and implementing a right of way regulatory ordinance, which in some cases are inaccurate, and in others, outright falsehoods. Greenwood Village was not provided with any notice from Qwest indicating that Qwest had cited Greenwood Village in support of its argument seeking a rulemaking from the Commission that would preempt local government right of way management authority. In these comments, Greenwood Village seeks to correct the record by identifying the inaccurate information provided by Qwest, and describing the true state of affairs in connection with Greenwood Village's ordinance.

**II. DRAFTING AND CONSIDERATION OF GREENWOOD VILLAGE'S RIGHT  
OF WAY ORDINANCE**

Greenwood Village staff has been working on the development of a comprehensive right of way management ordinance for approximately three years. Qwest has been an active participant in reviewing various drafts of this ordinance and providing comments, both in writing and in meetings, with respect to the ordinance. James P. Campbell, one of the Qwest representatives who met with Commission Staff in March, had direct knowledge of the status of the Greenwood Village discussions regarding this ordinance at the time of Qwest's ex parte filing with the Commission. Mr. Campbell has been the Qwest representative who has had direct contact with Greenwood Village meetings and correspondence regarding the proposed right of

way ordinance. See, Affidavit of Assistant City Attorney Kendra L. Carberry, attached as Exhibit A. What follows is a point by point description of, and response to inaccurate and misleading information represented by Qwest in its ex parte filing.

1. One of the documents contained in Qwest's ex parte filing is titled "FCC Presentation Regarding Access to Public Rights of Way and Franchise Issues, Washington D.C., March 9, 2001" ("Qwest Presentation Document"). On Page 5 of the Qwest Presentation Document, under the heading "What is the Problem", Qwest includes a subheading of "Specific Examples", followed by identification of ordinances from municipalities around the country that it claims are inappropriate forms of regulation under Section 253 of the Telecommunications Act. The clear implication of Qwest's comments is that each of the identified regulations have been adopted, and are currently in force. This is not true in connection with the Greenwood Village ordinance. Qwest did not represent in its ex parte filing that the Greenwood Village ordinance has not been adopted. Qwest provided Commission Staff with excerpts of "Draft No. 3" of that ordinance. The City is currently working on Draft No. 10. The draft ordinance has not yet been developed to a point where it has been presented to the City Council for a Study Session. Qwest inaccurately represented this document as the current state of the law in Greenwood Village.

2. On Page 7 of the Qwest Presentation Document, under a heading "Imposition of Third Tier of Regulation Unrelated to the Management of Rights of Way", Qwest identifies Greenwood Village and states "requirement that providers submit 'as built' location of facilities under electronic format specifically requested by the City (GIC, AUTOCAD)". In support of that statement, Qwest submitted an excerpt of Draft No. 3 of the Greenwood Village ordinance dated 3/7/01. The ordinance did not contain a requirement for the production of "as built" maps. However, Section 12.04.060.C.1 requires submittals in accordance with the City's Construction and Excavation Standards, a separate document. Those standards now require submittal of daily as built maps during construction. In any event, it is inconceivable that Qwest could argue that a requirement to provide maps of facilities located in public rights of way amounts to a third tier of regulations. Qwest does not cite (nor can it cite) any state or federal regulations that require maps detailing the exact location of private facilities in public rights of way, to be provided to the local government owners of those rights of way. As an example of why such a regulation is not only reasonable, but necessary, Greenwood Village's existing right of way ordinance requires delivery of as built maps at the end of construction. Recently, another telecommunications company undertook a major excavation project in Public rights of way in Greenwood Village. It provided as built maps at the end of the project. Upon review of those maps, the City determined that **a full 60%** of the installation was out of the alignment identified on the original plans, and a portion of the facilities were installed outside of the public rights of way, on private property. The City is now left with the choice of requiring this company to dig up the streets again and re-do their project, or requiring easements from the private property owners. It is absolutely essential for a local government to know where private infrastructure in public rights of way is located and to have the information to monitor the installation of that infrastructure during construction.

3. On Page 9 of the Qwest Presentation Document, under the heading "What is the Effect of the Problem?", in a subheading of "Customer Service", Qwest claims that Greenwood

Village “has placed a moratorium on construction permits being issued. This has increased the ‘held order’ problem”. This statement is false. Greenwood Village has enacted no moratorium. In fact, nowhere in the draft of the ordinance that had been shared with Qwest prior to its ex parte filings with the Commission, does the word “moratorium” ever appear. See, Exhibit A, Carberry Affidavit. Attached as Exhibit B is a cover memo from Jim Campbell at Qwest to Assistant City Attorney Kendra Carberry, which includes a marked up version of the Greenwood Village draft ordinance, with Qwest’s comments addressing the various sections of the ordinance Qwest believed needed to be changed. The Commission should note that in Qwest’s own comments to Greenwood Village it makes no reference to any moratorium. Moreover, in all of the meetings between Qwest and Greenwood Village, Qwest never once mentioned any concern about a moratorium. See Exhibit A, Carberry Affidavit.

To the best that Greenwood Village can determine, Qwest’s misleading representation to the Commission of a “moratorium” may refer to language in Section 12.04.210 of the proposed ordinance, which restricts access to a limited number of major streets within the City for “major installations” (which are defined as 500 feet or more of installation), with the restriction being that six streets can be excavated during one year in every three years.

While Qwest never made any comments to Greenwood Village regarding concerns about moratoria, it did raise concerns about restricted access to certain streets in Greenwood Village during a meeting on March 14, 2001, (see Exhibit A, Carberry Affidavit) and in written comments dated March 23, 2001 (see, Exhibit B). Changes were made to accommodate Qwest’s concerns in Section 12.04.210 in a subsequent version of this draft ordinance, which has been provided to Qwest. These changes allow additional exceptions to provide service to new customers, and to address provider of last resort obligations.

Finally, on this point, despite Qwest’s allegation that a Greenwood Village moratorium was increasing a “held order” problem, the Commission should note that Greenwood Village is issuing permits to all telecommunications companies, including Qwest. Qwest has been receiving permits continually, including during the time period in which it represented to the Commission that a moratorium was in place. Qwest has *never* been turned down for a permit to excavate in Greenwood Village as a result of any ordinance or moratorium restricting access to public rights of way. See Exhibit A, Carberry Affidavit.

4. In the Qwest Presentation Document, Qwest made no other specific complaint about any Greenwood Village procedures or requirements. However, Qwest did attach the cover page as well as pages 5, 13, 16, 17 and 19 of Draft No. 3 of the ordinance dated 3/7/01. Greenwood Village has reviewed the substance of the requirements contained on those pages, and compared them to the written comments received from Qwest regarding this ordinance on March 23, 2001, and the changes made to the ordinance in subsequent drafts. In Exhibit B, Qwest raised objections to subsections C and D of Section 12.04.040 of the 3/7/01 draft. Greenwood Village did not agree with Qwest’s proposed change to subsection C, but did agree with the proposed change in subsection D, and incorporated that change into subsequent drafts.

5. When considering the substance of Page 13 of the 3/7/01 draft that Qwest presented to the Commission, Qwest’s 3/23/01 comments identify an objection to subsection B

of Section 12.04.180. In subsequent drafts of the ordinance provided to Qwest, Greenwood Village addressed Qwest's concerns by deleting subsection B in its entirety.

6. On Page 16 of the 3/7/01 draft which Qwest submitted to the Commission, in its written comments to the City, Qwest suggested addition of a new subparagraph F to Section 12.04.210. The City included that new subsection in a subsequent draft, which Qwest presently has in its possession.

7. On Page 17 of the 3/7/01 draft that Qwest submitted to the Commission as evidence of Greenwood Village's actions that are allegedly beyond the scope of Section 253, the City compared the two sections of the proposed ordinance contained on that page (Section 12.04.230 and 12.04.240) with those same two sections that were attached to Qwest's "marked up" version of the ordinance draft dated 3/23/01 (Exhibit B). In Qwest's marked up version, Qwest makes no comment whatsoever regarding either of these two sections. One might expect that if Qwest believed that provisions of the proposed ordinance were so objectionable as to identify them to the Commission in support of a request for a rulemaking that would preempt local right of way authority, that Qwest would have raised its concerns directly to Greenwood Village in the written comments it filed at the same point in time. It is unusual, to say the least, that Qwest would object to a certain provision of an ordinance to the Commission, while at the same time indicating to the City that is considering that ordinance, that Qwest has no objection to those sections.

8. On Page 19 of the 3/7/01 draft provided to the Commission in the ex parte filing, the proposed ordinance addresses penalties for violations of the ordinance. In Qwest's subsequent verbal and written comments to Greenwood Village it objects to the amount of the fines, claiming that they are excessive. Greenwood Village submits that the fines are absolutely appropriate. Greenwood Village is home to the Denver Technological Center, one of the largest employment centers in Colorado. It is also home to perhaps the worst traffic problems in the state as well. Because of the substantial employment base in this community, its location on the south side of the metro area, its being bisected by Interstate 25, the major north/south highway in the State of Colorado, traffic is a major issue and a serious public, health and safety concern on the best of days. Greenwood Village has limited east-west arterial access, and in addition to these "normal" conditions, the City is currently bracing for additional traffic problems as the state begins a major expansion/widening of Interstate 25 as well as construction of a new light rail line along the same corridor. Permit violations that cause major local transportation corridors to be unnecessarily closed especially during rush hour are extremely serious violations and are best addressed through the discretion of local elected officials, as these officials are authorized to act by state law. Greenwood Village believes that companies like Qwest should focus more attention on compliance with the terms of right of way ordinances and completing their work in a reasonable time period, rather than the penalties they will be required to pay if and when they violate those provisions.

Greenwood Village is aware of the requirement that in declaratory and rulemaking proceedings seeking preemption of local right of way authority, petitioners are obligated to provide notice to state and local governments identified as evidence supporting preemption, in order that those entities have a fair opportunity to consider the arguments made and provide their

own information to the Commission for consideration. 47 C.F.R. § 1.1204(b) (note 4 to paragraph (b)); 47 C.F.R. § 1.1206(a) (note 1 to paragraph (a)). Technically, because this proceeding is a Notice of Inquiry, and not a rulemaking or declaratory proceeding, Qwest was not *required* to provide notice to Greenwood Village. However, good faith and fair dealing suggests that Greenwood Village (as well as the other local governments identified in Qwest's filing) should have received notice. This is especially true considering that the representations made about Greenwood Village were inaccurate, misleading and omitted material information regarding the status of the ordinance, considering Qwest's active involvement in the discussions regarding the ordinance, and considering the various changes in the ordinance that have been made to accommodate Qwest's concerns. Greenwood Village only learned of Qwest's filing inadvertently, when a summary was provided to Greenwood Village's outside counsel by another source. Greenwood Village submits to the Commission that Qwest's decision not to provide notice of this filing to Greenwood Village, coupled with the inaccurate information contained in the filing, suggests that the complaints regarding the other local governments identified by Qwest may well be inaccurate as well. Greenwood Village suggests that the Commission disregard the information submitted by Qwest in its ex parte presentation, and require in all future cases that state and local governments identified in *all* proceedings before the Commission as examples of bad practices warranting preemption of state and/or local authority, be provided notice by the entity making the filing, so as to provide due process and a fair opportunity for response.

### III. CONCLUSION

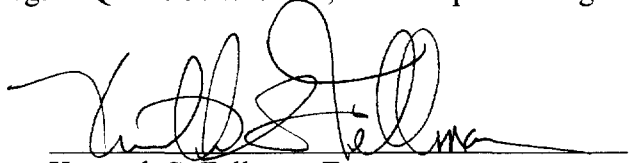
At the time of Qwest's filing of its ex parte materials on March 28, 2001, Qwest knew, but did not disclose represent to the Commission, that the "ordinance" was only a draft, and had not yet been presented to the Greenwood Village City Council. Qwest identified complaints to the Commission regarding certain sections of the ordinance without informing the Commission that it was working with Greenwood Village to address these complaints. Qwest also knew, based upon its meetings and correspondence with Greenwood Village, that there would be subsequent drafts of the ordinance which would address at least some of the concerns raised by Qwest in mid-March, and failed to include this information in its written ex parte filing. Qwest identified sections of the ordinance to the Commission as problems, without identifying those sections to Greenwood Village as problems. Finally, Qwest misrepresented that Greenwood Village had enacted a moratorium, when in fact that had not occurred, and failed to inform the Commission that Qwest has continued to receive permits from Greenwood Village, uninterrupted, for work in the public rights of way. Qwest made all of these representations to the Commission without informing Greenwood Village that Qwest was using Greenwood Village as an example of an entity that was pursuing "bad practices" and in support of its position that the Commission commence rulemaking to limit local right of way management authority.

The process for developing the Greenwood Village ordinance demonstrates that local governments and the industry can work together in the development of right of way management regulations. The two sides will not agree on every issue, but by and large, workable ordinances will result from this process. Individual problems should be addressed on a case by case basis. It would be simpler for the industry to bypass local government, and rely on a national rule



preempting local management authority. However, such a rule is neither warranted, nor is there legal authority to impose it.

For all of these reasons, Greenwood Village respectfully requests that the Commission disregard all of the information it received from Qwest in the ex parte meetings that occurred during the month of March 2001, and further disregard Qwest's March 28, 2001 ex parte filing in these proceedings.



Kenneth S. Fellman, Esq.  
Kissinger & Fellman, P.C.  
3773 Cherry Creek N. Dr., Suite 900  
Denver, Colorado 80209  
(303) 320-6100

Attorneys for the City of Greenwood  
Village, Colorado

#### **CERTIFICATE OF SERVICE**

I, Elizabeth Jackson, a legal assistant at the law firm of Kissinger & Fellman, P.C., hereby certify that on this 5<sup>th</sup> day of July, 2001, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

The Honorable Michael K. Powell, Chairman  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Room 8-B201  
Washington, D.C. 20554

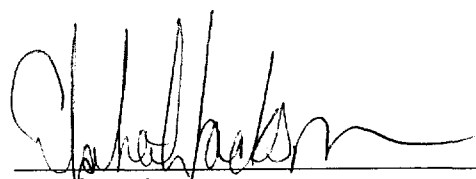
The Honorable Kathleen Q. Abernathy, Commissioner  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Room 8-A204  
Washington, D.C. 20554

The Honorable Michael J. Copps, Commissioner  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Room 8-BA302  
Washington, D.C. 20554

The Honorable Gloria Tristani, Commissioner  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Room 8-B115H  
Washington, D.C. 20554

The Honorable Kevin J. Martin, Commissioner  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Room 8-C302  
Washington, D.C. 20554

Lynn R. Charytan, Esq.  
Wilmar, Cutler & Pickering  
2445 M. Street, N.W.  
Washington, D.C. 20037-1420

  
\_\_\_\_\_  
Legal Assistant

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**RECEIVED**

**JUN 29 2001**

**KISSINGER &  
FELLMAN, P.C.**

In the Matter of )  
 )  
Notice of Inquiry: )  
 )  
Promotion of Competitive Networks in Local )  
Telecommunications Markets )

WT Docket No. 99-217

**AFFIDAVIT OF KENDRA L. CARBERRY**

STATE OF COLORADO )  
 ) ss.  
COUNTY OF DENVER )

Affiant, duly sworn and upon her oath, states as follows:

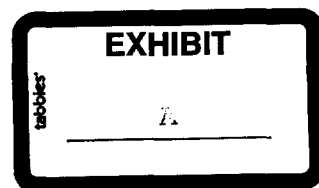
1. My name is Kendra L. Carberry. I am an attorney licensed to practice law in the State of Colorado.

2. I am employed by the law firm of Hayes, Phillips & Maloney, P.C., in Denver, Colorado. Herbert C. Phillips of our firm is the City Attorney for Greenwood Village, Colorado, and I serve as one of the Assistant City Attorneys. In this capacity, I am the Assistant City Attorney who has had primary responsibility for the development of Greenwood Village's Public Right-of-Way Permit Ordinance.

3. The development of this ordinance has been in process for approximately three years. Beginning in early March, 2001, Greenwood Village has shared drafts of its ordinance with approximately 70 representatives of the telecommunications and utility industry and other users of the public rights-of-way. Greenwood Village has actively sought the industry's comments on the proposed ordinance, and has initiated numerous discussions with industry representatives. Qwest Communications is one of the industry representatives that has been involved in reviewing and commenting on various drafts of the ordinance. My primary contact from Qwest has been James P. Campbell.

4. In early March 2001, Greenwood Village was working on Draft No. 3, the latest iteration of the Public Right-of-Way Permit Ordinance. Draft No. 3 is dated 3/7/01, and was provided to Qwest, among others. During the month of March, after receiving written comments from Qwest, I met personally with Mr. Campbell. A number of the proposed meeting dates were postponed because, as Mr. Campbell explained to me, Qwest had meetings scheduled in Washington D.C.

5. Mr. Campbell did attend a meeting with me on behalf of Qwest on March 14, 2001. Based upon that meeting, a number of changes were made in the draft ordinance, resulting in a new Draft No. 4. I received an email message from Mr. Campbell dated March 23, 2001,



which included his marked up version of the latest draft of the ordinance. Mr. Campbell's cover message to me with his marked up version of the ordinance is attached to Greenwood Village's Ex Parte Comments as Exhibit B.

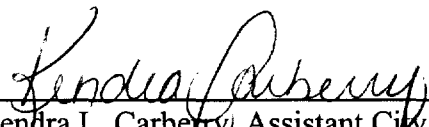
6. When Greenwood Village recently learned of Qwest's ex parte filing with the Commission in this proceeding, City staff members and officials were shocked to find that Qwest was alleging that Greenwood Village had enacted a "moratorium" on the issuance of permits for work in the public rights-of-way. In all of our meetings, telephone conversations and correspondence, neither Mr. Campbell, nor anyone else from Qwest ever expressed a concern to me that Greenwood Village was enacting or proposing to enact a moratorium. In fact, no moratorium has ever existed. Moreover, the City has reviewed its public right-of-way permit records, and Qwest has never been denied any permit to conduct operations in public rights-of-way by Greenwood Village based on the proposed ordinance or any so-called moratorium.

7. Qwest did raise concerns in our meeting on March 14, 2001 regarding the draft ordinance, and specifically the restrictions on access to certain streets in Greenwood Village. The ordinance would have restricted major installations in the six major arterial streets within the City to a rotating three-year schedule, with major installations only occurring during one year in every three years. "Major installations" are installations of 500 feet or more. The ordinance was amended in a subsequent draft to address Qwest's concern regarding customer service and provider of last resort obligations. During the month of March and thereafter in my numerous communications with Mr. Campbell, Mr. Campbell never once informed me that Qwest was complaining to the Commission about Greenwood Village's draft ordinance.

8. The City is currently working on Draft No. 10 of the ordinance, which is seven drafts beyond the one submitted to the Commission by Qwest. It is likely to be scheduled for a City Council Study Session in July, with formal consideration to take place sometime later this summer. The ordinance that City Council will consider contains substantial changes from the draft that Qwest gave to Commission Staff. The final version will incorporate numerous changes proposed by Qwest and other members of the telecommunications industry.

9. I have reviewed the Ex Parte Comments of the City of Greenwood Village, Colorado that are being filed together with this Affidavit, and the information contained therein is accurate to the best of my knowledge, information and belief.

Further, Affiant sayeth not.

  
Kendra L. Carberry, Assistant City Attorney  
City of Greenwood Village, Colorado

Subscribed and sworn to before me this 28th day of June, 2001 by Kendra L. Carberry, Assistant City Attorney for the City of Greenwood Village, Colorado.

WITNESS MY HAND AND OFFICIAL SEAL.

My Commission Expires: 11-10-01



Mildred L. Axtell  
Notary Public

## Kendra Carberry

**From:** Jim Campbell [campbej@uswest.com]  
**Sent:** Friday, March 23, 2001 3:23 PM  
**To:** Kendra Carberry  
**Cc:** Dina Diehl  
**Subject:** Comments



Mac Word 3.0



Mac Word 3.0

Kendra,

As promised attached are Qwest's general comments to the proposed ordinance from the City. As we discussed, Qwest is still reserving its right to challenge in its entirety the fee structure proposed by the City until we see a cost justification (in accordance with Senate Bill 10 and the recent Supreme Court Decision) prepared by the City which shows that the fees are related to the actual direct costs of the City in its management of the public streets. However, conceptually, we have the following comments on the fees:

1. Using the duration of a permit job as a denominator to calculate the costs to the City is improper. Whether a specific job takes Qwest 10 days or 100 days does not directly affect the costs incurred by the City in administering the use of its streets.

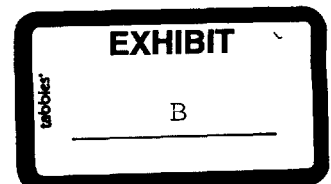
2. The degradation fees proposed by the City are not direct costs but rather indirect costs. Therefore, they would not be allowed under applicable law. In any event, they are extremely high. Qwest would be interested in seeing how the City came up with a cost to restore streets of \$23 per square yard.

In addition, I have attached to this e-mail a memorandum regarding Qwest's position that it should not have to obtain a PE stamp on each and every permit application.

Please call with questions.

Jim Campbell  
(303) 896-1208

(See attached file: GreenwoodOrdRed.doc)(See attached file: GreenwoodPE.doc)



**A BILL FOR AN ORDINANCE**

**ORDINANCE NO:** \_\_\_\_\_

**SERIES OF 2001**

**INTRODUCED BY:** \_\_\_\_\_

**AN ORDINANCE TO REPEAL AND REENACT CHAPTER 12.04 OF  
THE GREENWOOD VILLAGE CODE, ENTITLED PUBLIC RIGHT-OF-  
WAY PERMITS**

WHEREAS, obstructions and excavations in public rights-of-way disrupt and interfere with public use of the rights-of-way;

WHEREAS, obstructions and excavations in public rights-of-way result in loss of parking and loss of business to merchants and others whose places of business are in the vicinity of such obstructions and excavations;

WHEREAS, to provide for the health, safety and welfare of the City and its residents, it is desirable to adopt policies and regulations which will enable the City to gain greater control over the disruption and interference with the public use of public rights-of-way;

WHEREAS, significant public funds have been invested to acquire, build, maintain and repair the streets within the City, and cuts and excavations in the streets reduce the useful life of the pavement;

WHEREAS, significant public funds have been invested to place and maintain landscaping within public rights-of-way in the City, and cuts and excavations in the public rights-of-way cause damage to, and increase the costs of maintaining that landscaping;

WHEREAS, at the present time, the City does not have a detailed map or database indicating the location, nature, or extent of the entire system of underground utility and telecommunications facilities; and,

~~WHEREAS, private and commercial operators of motor vehicles pay added gasoline taxes to compensate for the damage their vehicles cause to City streets, and part of these taxes are used by the federal government (the federal highway "trust fund") for construction and maintenance of interstate and federal highways, and the State of Colorado annually transfers revenue from gasoline taxes to the City for street maintenance, while public and commercial utilities which degrade the streets do not adequately pay for the long term damage done to the roadway surfaces; and (Qwest objects to this language as it is unnecessary for a right-of-way ordinance. In addition, Qwest feels that the public use of rights-of-way is the largest drain on their useful life, and we should not subsidize for the restoration and repair where we are not the primary cuaser.~~

03/23/0103/22/01

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WHEREAS, at the present time there is no formal mechanism nor legal requirement that public and commercial utilities, cable operators and telecommunications providers coordinate excavation or construction in public rights-of-way within the City.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF GREENWOOD VILLAGE, COLORADO, ORDAINS:

Section 1. Chapter 12.04 of the Greenwood Village Code is hereby repealed in its entirety and reenacted to read as follows:

#### **Chapter 12.04**

#### **PUBLIC RIGHT-OF-WAY PERMITS**

##### **Sections:**

<b>12.04.010</b>	<b>Purpose and objectives.</b>
<b>12.04.020</b>	<b>Definitions.</b>
<b>12.04.030</b>	<b>Police power.</b>
<b>12.04.040</b>	<b>Permit required.</b>
<b>12.04.050</b>	<b>Developer ownership of infrastructure.</b>
<b>12.04.060</b>	<b>Permit application.</b>
<b>12.04.070</b>	<b>City review and approval.</b>
<b>12.04.080</b>	<b>Permit fees.</b>
<b>12.04.090</b>	<b>Insurance.</b>
<b>12.04.100</b>	<b>Indemnification.</b>
<b>12.04.110</b>	<b>Performance bonds and letters of credit.</b>
<b>12.04.120</b>	<b>Warranty.</b>
<b>12.04.130</b>	<b>Inspections.</b>
<b>12.04.140</b>	<b>Time of completion.</b>
<b>12.04.150</b>	<b>Joint planning and construction.</b>
<b>12.04.160</b>	<b>Locate information.</b>
<b>12.04.170</b>	<b>Minimal interference with other property.</b>
<b>12.04.180</b>	<b>Underground construction and use of poles.</b>
<b>12.04.190</b>	<b>Use of trenches and conduits by City.</b>
<b>12.04.200</b>	<b>Construction and excavation standards.</b>
<b>12.04.210</b>	<b>Restricted rights-of-way.</b>
<b>12.04.220</b>	<b>Relocation of facilities.</b>
<b>12.04.230</b>	<b>Abandonment and removal of facilities.</b>
<b>12.04.240</b>	<b>Emergency procedures.</b>
<b>12.04.250</b>	<b>Reimbursement of City costs.</b>
<b>12.04.260</b>	<b>Permit revocation and stop work orders.</b>
<b>12.04.270</b>	<b>Penalties.</b>

##### **12.04.010 Purpose and objectives.**

A. Purpose. The purpose of this Chapter is to establish principles, standards and procedures for the placement of facilities, construction, excavation,



encroachments and work activities within or upon any public right-of-way, and to protect the integrity of the City's street system.

B. Objectives. Public and private uses of public rights-of-way should, in the interests of the general welfare, be accommodated; however, the City must ensure that the primary purpose of the public right-of-way, passage of pedestrian and vehicular traffic, is protected. The use of the public rights-of-way by private users is secondary to these public objectives. This Chapter has several objectives:

1. To protect the public safety.
2. To minimize public inconvenience.
3. To protect the City's infrastructure investment by establishing repair standards for the pavement, facilities, and property in the public rights-of-way.
4. To standardize regulations and thereby facilitate work within the rights-of-way.
5. To maintain an efficient permit process.
6. To conserve and fairly apportion the limited physical capacity of public rights-of-way held in public trust by the City.
7. To establish a public policy for enabling the City to discharge its public trust consistent with the rapidly evolving federal and state regulatory policies, industry competition and technological development.
8. To promote cooperation among permittees and the City in the occupation of the public rights-of-way, and work therein, in order to: (i) eliminate duplication of facilities that is wasteful, unnecessary or unsightly; (ii) lower the permittees' and the City's costs of providing services to the public; and (iii) minimize street cuts.
9. To protect the public health, safety, and welfare.

#### **12.04.020 Definitions.**

For purposes of this Chapter, the following words shall have the following meanings:

A. "Access structure" means any structure providing access to facilities in the public right-of-way.

B. "Construction and Excavation Standards" means the document entitled City of Greenwood Village Construction and Excavation Standards for

Public Rights-of-Way, as adopted by resolution of the City Council and amended from time to time.

C. "Contractor" means a person, partnership, corporation, or other legal entity which undertakes to construct, install, alter, move, remove, trim, demolish, repair, replace, excavate, or add to any improvements or facilities in the public right-of-way, or that requires work, workers, and/or equipment to be in the public right-of-way in the process of performing the above named activities.

D. "Developer" means the person, partnership, corporation, or other legal entity improving a parcel of land within the City and being legally responsible to the City for the construction of infrastructure within a subdivision or as a condition of a building permit.

E. "Duct or conduit" means a single enclosed raceway for cable, fiberoptic cable or other wires, or a pipe or canal used to convey fluids or gases.

F. "Emergency" means any event which may threaten public health or safety, or that results in an interruption in the provision of service, including, but not limited to, damaged or leaking water or gas conduit systems, damaged, plugged, or leaking sewer or storm drain conduit systems, damaged electrical and communications facilities.

G. "Excavate" or "excavation" means to dig into or in any way remove or penetrate any part of a public right-of-way, including trenchless excavation such as boring, tunneling and jacking.

H. "Facilities" means any pipe, conduit, wire, cable, amplifier, transformer, fiberoptic cable, antenna, pole, street light, duct, fixture, appurtenance or other like equipment used in connection with transmitting, receiving, distributing, offering, and providing utility and other services, whether above or below ground.

I. "Infrastructure" means any public facility, system, or improvement including water and sewer mains and appurtenances, storm drains and structures, streets, alleys, traffic signal poles and appurtenances, conduits, signs, landscape improvements, sidewalks, and public safety equipment.

J. "Landscaping" means grass, ground cover, shrubs, vines, hedges, trees and non-living natural materials commonly used in landscape development, as well as attendant irrigation systems.

K. "Major installation" means an excavation in the public right-of-way exceeding one thousand five hundred feet (\$1,000') in length. (NOTE: Qwest would request that major cuts be extended to one-thousand feet).

L. "Permit" means an authorization for use of the public rights-of-way granted pursuant to this Chapter.

M. "Permittee" means the holder of a valid permit issued pursuant to this Chapter.

N. "Public right-of-way" means any public street, way, place, alley, sidewalk, easement, park, square or plaza that is dedicated to public use.

O. "Work" means any labor performed within a public right-of-way and/or any use or storage of equipment or materials within a public right-of-way, including but not limited to: excavation; construction of streets, fixtures, improvements, sidewalks, driveway openings, bus shelters, bus loading pads, street lights, and traffic signal devices; construction, maintenance, and repair of all underground facilities such as pipes, conduit, ducts, tunnels, manholes, vaults, cable, wire, or any other similar structure; maintenance of facilities; and installation of overhead poles used for any purpose.

#### **12.04.030 Police power.**

A. A permittee's rights hereunder shall at all times be subject to the police power of the City, which includes the power to adopt and enforce ordinances, including amendments to this Chapter, necessary for the safety, health, and welfare of the public.

B. The City reserves the right to exercise its police power, notwithstanding anything in this Chapter or any permit to the contrary. Any conflict between the provisions of any permit and any other present or future lawful exercise of the City's police power shall be resolved in favor of the latter.

#### **12.04.040 Permit required.**

A. No person except an employee or official of the City or a person exempted by contract with the City shall undertake or permit to be undertaken any work in a public right-of-way without first obtaining a permit from the City as set forth in this Chapter. Copies of the permit and associated documents shall be maintained on the job site and available for inspection upon request by any officer or employee of the City.

B. No permittee shall perform work in an area larger or at a location different, or for a longer period of time than that specified in the permit. If, after work is commenced under an approved permit, it becomes necessary to perform work in a larger or different area or for a longer period of time than what the permit specifies, the permittee shall notify the City immediately and within twenty-four (24) hours shall file a supplementary application for the additional work.

C. Permits shall not be transferable or assignable without the prior written approval of the City, which approval shall not be unreasonably be withheld.

D. Except for emergency operations pursuant to Section below,  
~~a~~Any person conducting any work within the public right-of-way without having first obtained the required permit(s) shall immediately cease all activity (exclusive of actions required to restore the area in accordance with City requirements) and obtain a permit before work may be resumed.

#### **12.04.050 Developer ownership of infrastructure.**

In the City, the construction of infrastructure in new developments is the responsibility of the developer. Once a public right-of-way has been dedicated to the City, all work in that public right-of-way, including the installation of new infrastructure by a developer, shall be subject to this Chapter.

#### **12.04.060 Permit application.**

A. An applicant for a public right-of-way permit shall file a written application on a form furnished by the ~~City which~~ City, which includes the following information:

1. The date of application;
2. The name, address and telephone number of the applicant and any contractor or subcontractor which will perform any of the work;
3. A plan showing the work site, the public right-of-way boundaries, all infrastructure in the area, and all landscaping in the area;
4. The purpose of the proposed work to be conducted within the right-of-way;
5. A traffic control plan in accordance with the Construction and Excavation Standards;
6. The dates for beginning and ending the proposed work and proposed hours of work, and the number of actual work days required to complete the project;
7. A copy of each contractor's license required by Chapter 13.12 of this Code; and
8. The applicable permit fees as set by resolution of the City Council.

B. For any work in the public right-of-way which includes excavation, in addition to the information required by Subsection A hereof, the application shall include the following information:

1. ~~An itemization of the total cost of restoration, based upon R.S. Means Estimating Standards or at the direction of the City, other published street repair cost estimating standards;~~ (NOTE: Because the City cannot, under Senate Bill 10, collect costs based on Qwest's cost of construction, this requirement is irrelevant to the City's management of the public rights-of-way).
2. Copies of all permits and licenses (including required insurance, deposits, bonding, and warranties) required to do the proposed work, whether

required under the laws of the United States, the State of Colorado, or City ordinances or regulations.

C. An applicant for a public right-of-way permit for a major installation shall, in addition to the information required by Subsections A and B hereof, submit the following information:

1. To the extent known, locates of all existing facilities located within five feet of the proposed facility, which shall be compiled and submitted according to the Construction and Excavation Standards; and

2. ~~Engineering construction drawings or site plans for the proposed work, signed by a professional engineer licensed in the State of Colorado.~~ (NOTE: Qwest feels it is exempt under State law from this requirement. We will provide legal justification).

D. An applicant shall update a permit application within ten days after any material change occurs.

E. Applicants may apply jointly for permits to work in public rights-of-way at the same time and place. Applicants who apply jointly for permits may share in the payment of the permit fees. Applicants must agree among themselves as to the portion each shall pay, and if no agreement is reached, payment in full shall be required of all applicants.

F. In all cases, the applicant for a public right-of-way permit and the eventual permittee shall be the owner of the facilities to be installed, maintained or repaired, rather than the contractor performing the work.

G. ~~By signing an application, the applicant is certifying to the City that the applicant is in compliance with all other permits issued by the City, and that the applicant is not delinquent in any payment due to the City for prior work.~~ (NOTE: Each permit should be specific to the job undertaken by Qwest. This type of catchall phrase places Qwest in the position of having future permits denied which are unrelated to the permit in question. If the City were willing to propose language where non-compliance with other permits was substantial in nature, we would be able to agree to an amendment of this section.)

#### **12.04.070 City review and approval.**

A. An application for a public right-of-way permit shall be reviewed by the City for completeness within five working days of submission. If the application is not complete, the City shall notify the applicant of all missing information.

B. Once an application is deemed complete by the City, the City shall review the application as follows:

1. For a public right-of-way permit which does not include excavation, within five working days.

2. For a public right-of-way permit which includes excavation, within ten working days.

3. For a public right-of-way permit for a major installation, within fifteen working days.

C. At the conclusion of the review period, the City shall either approve the permit, approve the permit with conditions, or deny the permit.

#### **12.04.080 Permit fees.**

A. Before a public right-of-way permit is issued, the applicant shall pay to the City a permit fee, which shall be determined in accordance with a fee schedule adopted by resolution of the City Council. All fees charged by the City related to a proposed application Permit fees shall be reasonably related to the costs of managing the public rights-of-way. These costs include, but are not limited to, the costs of issuing rights-of-way permits, verifying rights-of-way occupation, mapping rights-of-way occupation (NOTE: Please clarify that Qwest will not be subsidizing the City for installation of its mapping system), inspecting work, administering this Chapter, and costs relating to restoration of the public right of way to remedy degradation of that public right of way caused by permittees (NOTE: Senate Bill 10 limits the City to recovering its actual and direct costs associated with administration and management of permits and applications. Street restoration and degradation is not a direct cost to the City).

B. No restoration fee shall be required for a public right-of-way permit which does not include excavation.

~~C. Restoration fees shall be segregated by the City into an account to cover general street maintenance and construction.~~

#### **12.04.090 Insurance.**

A. Unless otherwise specified in a franchise agreement between a permittee and the City, prior to the granting of any permit, the permittee shall carry and maintain in full effect at all times the following insurance coverage:

1. Commercial general liability insurance, including broad form property damage, completed operations contractual liability, explosion hazard, collapse hazard, underground property damage hazard, commonly known as XCU, for limits not less than one million dollars (\$1,000,000) each occurrence for damages of bodily injury or death to one or more persons; and five hundred thousand dollars (\$500,000) each occurrence for damage to or destruction of property.

2. Workers compensation insurance as required by State law.

B. The permittee shall file with the City proof of such insurance coverage in a form satisfactory to the City (NOTE: The City was to add prospect of providing self insurance).

**12.04.100 Indemnification.**

A. Each permittee, for itself and its related entities, agents, employees, subcontractors, and the agents and employees of said subcontractors, shall save the City harmless and defend and indemnify the City, its successors, assigns, officers, employees, agents, and appointed and elected officials from and against all liability or damage and all claims or demands whatsoever in nature, and reimburse the City for all its reasonable expenses, as incurred, arising out of permittee's acts or omissions with respect to its any work or activity in the public right-of-way, including, but not limited to, the actions of the permittee, its employees, agents, contractors, related entities, successors and assigns, or the securing of and the exercise by the permittee of any rights granted in the permit, including any third party claims, administrative hearings, and litigation; whether or not any act or omission complained of is authorized, allowed, or prohibited by this Chapter or other applicable law.

~~B. The terms of each contract awarded by a permittee for work pursuant to a permit shall contain indemnity provisions whereby the contractor shall indemnify the City to the same extent as described above.~~

C. Following the receipt of written notification of any claim the permittee shall have the right to defend the City with regard to all third party actions, damages and penalties arising in any way out of the exercise of any rights in the permit. If at any time, however, a permittee refuses to defend the City, and the City elects to defend itself with regard to such matters, the permittee shall pay all reasonable expenses incurred by the City related to its defense, including attorney fees and costs.

~~D. In the event the City institutes civil litigation against a permittee for a breach of the permit or for a violation of this Chapter and the City is the prevailing party, the permittee shall reimburse the City for all costs related thereto, including reasonable attorney fees. A permittee shall not be obligated to hold harmless or indemnify the City for claims or demands to the extent that they are due to the negligence, or any willful acts of the City or any of its officers, employees, or agents. (NOTE: Qwest would request that the ordinance provide that both parties pay for attorney's fees. This section in contractual in nature, and looks more like "franchise" language, which is disallowed under State law.)~~

E. If a permittee is a public entity, the indemnification requirements of this section shall be subject to the provisions of the Colorado Governmental Immunity Act.



**12.04.110 Performance bonds and letters of credit.**

A. Before a public right-of-way permit is issued, the applicant shall file with the Director a bond or letter of credit in favor of the City in an amount equal to the total cost of construction, including labor and materials, or five thousand dollars, whichever is greater. The bond or letter of credit shall be executed by the applicant as principal and by at least one surety upon whom service of process may be had in the state. The bond or letter of credit shall be conditioned upon the applicant fully complying with all provisions of City ordinances, rules and regulations, and upon payment of all judgments and costs rendered against the applicant for any violation of City ordinances or state statutes that may be recovered against the applicant by any person for damages arising out of any negligent or wrongful acts of the applicant in the performance of work pursuant to the permit.

B. The City may bring an action on the bond or letter of credit on its own behalf or on behalf of any person so aggrieved as beneficiary.

C. The bond or letter of credit shall be approved by the City's finance director prior to the issuance of the permit. However, the City may waive the requirements of any such bond or letter of credit or may permit the applicant to post a bond without surety thereon upon finding that the applicant has financial stability and assets located in the state to satisfy any claims intended to be protected against the security required by this section.

D. A letter of responsibility, in a form acceptable to the City, shall be accepted in lieu of a performance bond or letter of credit from all special districts operating within the City.

E. The performance bond, letter of credit or letter of responsibility shall remain in force and effect for a minimum of three years after completion and acceptance of the street cut, excavation or lane closure.

**12.04.120 Warranty.**

A. A permittee, by acceptance of the permit, expressly warrants and guarantees complete performance of the work in a manner acceptable to the City and warrants and guarantees all work done for a period of two ~~three~~ years after the date of probationary acceptance, and agrees to maintain upon demand and to make all necessary repairs during the two ~~three~~ year period. This warranty shall include all repairs and actions needed as a result of:

1. Defects in workmanship.
2. Settling of fills or excavations.
3. Any unauthorized deviations from the approved plans and specifications.